Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

ALEXANDRE KONANYKHINE,
Petitioner,

v.

IZVESTIA NEWSPAPER and EDITORIAL STAFF OF IZVESTIA NEWSPAPER,
Respondents.

On Petition for a Writ of Certiorari to the Virginia Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A 1935 agreement between the United States and the former Soviet Union established procedures to be followed in the execution of letters rogatory.* This agreement lay dormant and without judicial interpretation for almost sixty years, but was recently resurrected in a series of contradictory decisions concerning service of process on defendants located in the Russian Federation.

The questions presented are:

1. Whether the 1935 agreement is valid.

2. Whether the 1935 agreement provides the exclusive method of perfecting service of process on defendants located in the Russian Federation.

3. Whether the trial court erred in vacating a default judgment and in dismissing a civil action against a Russian defendant on the sole ground that service of process was not perfected via letters rogatory pursuant to the 1935 agreement.

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* Agreement Relating to the Procedure to be Followed in the Execution of Letters Rogatory; Exchange of Notes at Moscow, Nov. 22, 1935, U.S.—U.S.S.R., 49 Stat. 3840, E.A.S. No. 83, II Bevans 1262. ("1935 agreement") (reprinted at pages 15a-23a of the appendix).

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On Petition for a Writ of Certiorari to the Virginia Supreme Court

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PETITION FOR WRIT OF CERTIORARI

Alexandre Konanykhine ("Konanykhine") respectfully petitions for a writ of certiorari to the Virginia Supreme Court.

CITATIONS OF OPINIONS AND ORDERS BELOW

The Arlington County Circuit Court order vacating the default judgment is reproduced at page 2a of the appendix ("Pet App."). The Arlington County Circuit Court letter opinion quashing service of process and dismissing the case against respondents is reproduced at Pet. App. 6a. The Arlington County Circuit Court order formally quashing service of process and dismissing the case against respondents is reproduced at Pet. App. 4a. The Virginia Supreme Court order refusing to consider Konanykhine's petition for appeal

is reproduced at Pet. App. 1a. The Virginia Supreme Court order denying Konanykhine's petition for rehearing is reproduced at Pet. App. 14a. No opinion or order was reported.

BASIS FOR JURISDICTION

The Arlington County Circuit Court vacated the default judgment on March 10, 2000. Pet. App. 2a. The Arlington County Circuit Court quashed service of process and dismissed the case on October 13, 2000. Pet. App. 4a. The Virginia Supreme Court denied Konanykhine's petition for appeal on March 5, 2001. Pet. App. 1a. The Virginia Supreme Court denied Konanykhine's petition for rehearing on April 20, 2001. Pet. App. 14a.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a) (2001) and SUP. CT. R. 10(c) since this case involves an important question of federal law that has not been, but should be, settled by this Court. Specifically, the state court applied its interpretation of a treaty between the United States and the former Soviet Union in vacating a default judgment and in dismissing a case against a defendant located in the Russian Federation.

Since 28 U.S.C. § 2403(a) (2001) may apply, notifications required by SUP. CT. R. 29.4(b) have been made.

INTERNATIONAL AGREEMENT INVOLVED IN THIS CASE

Agreement Relating to the Procedure to be Followed in the Execution of Letters Rogatory; Exchange of Notes at Moscow, Nov. 22, 1935, U.S.—U.S.S.R., 49 Stat. 3840, E.A.S. No. 83, II Bevans 1262.

Because of its length, the full text of this agreement is set forth at Pet. App. 15a-23a.

STATEMENT OF THE CASE

A. Introduction

This case presents the narrow issue of whether a party suing a Russian defendant in a United States court must resort to the exclusive use of the complicated, dilatory and expensive system of letters rogatory in order to perfect service on the Russian defendant. In the instant matter, a Russian defendant who transacted business in Virginia, was served with process pursuant to the Virginia long-arm statute. This statute prescribed delivery of the initial pleadings and Russian translations thereof to the Secretary of the Commonwealth of Virginia, who, under Virginia law, was the Russian defendant's involuntary agent for service of process. The Russian defendant filed a response to Konanykhine's initial pleading but did not raise defective service as a defense. Aside from filing its response, the Russian defendant failed to further participate in the litigation until after a default judgment was entered. The sole issue to be decided is whether service on the Russian defendant's involuntary agent for service of process which actually reached the Russian defendant is valid, despite the 1935 agreement. Agreement Relating to the Procedure to be Followed in the Execution of Letters Rogatory; Exchange of Notes at Moscow, Nov. 22, 1935, U.S.—U.S.S.R., 49 Stat. 3840, E.A.S. No. 83, II Bevans 1262. ("1935 agreement") Pet. App. 15a-23a.

B. Background of Parties, Service of Process and Default Judgment

Alexandre Konanykhine was born in the former Soviet Union in 1966. By 1992, Konanykhine's estimated worth was over three hundred million dollars, making him one of the wealthiest men in Russia. In addition to his business pursuits, Konanykhine was politically active and supported Russian President Boris Yeltsin's anti-corruption, pro-capitalist and pro-democratic policies by providing half of

President Yeltsin's campaign funds. In mid-1992, several current or former KGB members kidnapped Konanykhine and seized control of his businesses under threat of death. After escaping from his kidnappers, Konanykhine fled to the United States, where he sought political asylum. In awarding Konanykhine political asylum, the United States Immigration Court found that the Russian government engineered false claims against Konanykhine in order to punish him for exposing corruption among Russian government and business officials.

Izvestia Newspaper and Editorial Staff of Izvestia Newspaper (collectively "Izvestia") publish the newspaper, *Izvestia*, in Moscow, Russia. In 1996 and 1997, Izvestia published several defamatory articles concerning Konanykhine. Because Izvestia transacted business in Virginia by employing an editor in Virginia, by locating its U.S. bureau in Virginia, and by delivering the defamatory articles into Virginia, Konanykhine filed a civil action in the Arlington County Circuit Court pursuant to the Virginia Long-Arm Statute, VA. CODE ANN. §8.01-328.1 (Michie 1997). In December 1997, Konanykhine served both English and Russian language copies of his initial pleadings on the Secretary of the Commonwealth of Virginia, who, under Virginia law, was Izvestia's involuntary agent for service of process. Izvestia received the documents served on the Virginia Secretary of the Commonwealth and filed a legally defective response to Konanykhine's initial pleading. Pet. App. 24a-26a. Izvestia's response did not raise defective service as a defense. In April 1998, the trial court found that valid service of process was made upon Izvestia and that Izvestia was in default for its failure to properly respond to Konanykhine's claims. Pet. App. 10a-13a. Aside from filing its initial response, Izvestia failed to further participate in the defamation litigation or jury trial on Konanykhine's damages. In December 1999, the jury returned a $33,500,000 verdict in

Konanykhine's favor and the trial court entered judgment by default in the amount of the jury verdict. Pet. App. 8a.

C. Orders Dismissing Case based on Non-compliance with 1935 Agreement

1. *Trial Court Orders*

In February 2000, Izvestia filed its motion to vacate the default judgment, claiming that the 1935 agreement required service of process via letters rogatory. In March 2000, after extensive briefing and oral argument, the trial court vacated the default judgment on the sole ground that "service was not perfected pursuant to the 1935 agreement." Pet. App. 2a. Konanykhine objected to the entry of this order interpreting the 1935 agreement pursuant to Virginia law by endorsing the order "SEEN AND OBJECTED." Izvestia then moved to dismiss Konanykhine's case since service of process was not perfected via letters rogatory. On August 25, 2000, after entensive briefing and oral argument, the trial court dismissed the case via a letter opinion, holding that "the only proper means of service on Defendant Izvestia Newspaper is through letters rogatory. No such service was made. Thus, service was not proper in this case." Pet. App. 6a. On October 13, 2000, the trial court incorporated its letter opinion into a formal order dismissing the case. Pet. App. 4a. Konanykhine objected to the entry of this order interpreting the 1935 agreement pursuant to Virginia law by endorsing the order "SEEN AND OBJECTED TO ON ALL GROUNDS ASSERTED ON BRIEF AND AT ORAL ARGUMENT."

2. *Virginia Supreme Court Refusal to Review Trial Court Orders*

On November 21, 2000, Konanykhine petitioned the Virginia Supreme Court for review of the trial court's orders vacating the default judgment and dismissing the case, claiming that the 1935 agreement did not require service to be

perfected via letters rogatory. On March 5, 2001, the Virginia Supreme Court refused to exercise its discretion to review the trial court's orders in an unpublished two sentence order. Pet. App. 1a. On March 19, 2001, Konanykhine filed his timely petition for rehearing of the Virginia Supreme Court's refusal to review the trial court's orders. On April 20, 2001, the Virginia Supreme Court denied Konanykhine's petition for rehearing. Pet. App. 14a.

REASONS FOR GRANTING THE WRIT

I. RECENT CONFLICTING U.S. DISTRICT COURT DECISIONS INTERPRETING THE LONG DORMANT 1935 AGREEMENT BETWEEN THE UNITED STATES AND SOVIET UNION REVEAL A NEED FOR CLARIFICATION REGARDING THE APPLICABILITY OF THIS AGREEMENT TO SERVICE OF PROCESS ON RUSSIAN DEFENDANTS

In 1935, the United States and Soviet Union entered into an agreement regarding the procedures for execution of letters rogatory. Agreement Relating to the Procedure to be Followed in the Execution of Letters Rogatory; Exchange of Notes at Moscow, Nov. 22, 1935, U.S.—U.S.S.R., 49 Stat. 3840, E.A.S. No. 83, II Bevans 1262. Pet. App. 15a-23a. The 1935 agreement did not establish the exclusive or mandatory method of perfecting service of process on a defendant located in the Soviet Union, as the lower court in the instant matter held, but rather sets forth such ministerial procedures as the fees to be paid in the execution of letters rogatory, the name of the court to which the letters rogatory were to be addressed and nature of the documents which must accompany the letters rogatory. In addition, there were very few, if any, private parties in the Soviet Union engaged in international transactions when the agreement was made. Therefore, in all likelihood, the 1935 agreement's drafters did

not contemplate that this agreement would require perfection of service via letters rogatory on a defendant which had conducted business in the U.S. but is domiciled in the Soviet Union, or as in the instant case, the successor state, the Russian Federation.

A. Completely Conflicting Decisions of U.S. District Courts Interpreting the 1935 Agreement

For almost sixty years, the 1935 agreement lay dormant and without court interpretation. In 1993, a court, for the first time, interpreted the 1935 agreement. In *Filus v. LOT Polish Airlines*, 907 F.2d 1328 (2nd Cir. 1990), which involved the U.S.S.R.'s claim of sovereign immunity, the Soviet Union objected to service of process based, in part, on non-compliance with the 1935 agreement. In *Filus*, the Second Circuit remanded the case to the district court, stating "[t]he legality of the service of process obtained by plaintiff must be evaluated in the light of the diplomatic exchange of notes [the 1935 agreement]." *Filus*, 907 F.2d at 1333. On remand, the district court found that the 1935 agreement does not require service via letters rogatory, stating "[p]lainly this exchange does not constitute an 'applicable international convention' for service of judicial documents. It covers procedures for each country to honor letters rogatory issued by courts of the other country." *Filus v. LOT Polish Airlines*, 819 F. Supp. 232, 237 (S.D.N.Y. 1993). Then, in *Semtek International Inc. v. Merkuriy Ltd.*, C.A. No. 95-11920-RCL, 1996 U.S. Dist. LEXIS 22248 (D. Ma. 1996), reprinted at Pet. App. 33a, the court came to a different interpretation of the 1935 agreement. In *Semtek*, the court observed that "[p]ursuant to [the agreement], the service of United States judicial documents upon a defendant in Russia is proper if it is accomplished by means of a letter rogatory." *Semtek* also observed that "[w]hile there is nothing in [the 1935 agreement] which explicitly precludes other methods of service other than letters

rogatory, a Supreme Soviet decrees strongly indicates that this is the case." In 1998, the United States District Court for the District of Massachusetts again held that the 1935 agreement "requires service by letters rogatory." *J.L. Reardon Associates, Ltd. v. NPO Energomash*, C.A. No. 97-10409-GAO, (D. Ma. 1998), reprinted at Pet. App. 40a. In 2000, the trial court in the instant matter, in reliance upon *Semtek* and *Reardon*, vacated the default judgment and dismissed the case against Izvestia even though Izvestia had actual knowledge of Konanykhine's case, and filed a response in the case, solely because Konanykhine did not perfect service via letters rogatory pursuant to the 1935 agreement. Pet. App. 2a-7a. The Virginia Supreme Court exercised its discretion to refuse to consider Konanykhine's appeal of the trial court's orders vacating the default judgment and dismissing the case. Pet. App. 1a. Also in 2000, a case in the Southern District of New York involved the interpretation of the 1935 agreement, but the defendant in that case, the Russian Federation, withdrew objections to service of process prior to court ruling on the Russian Federation's objections. *See Compagnie NOGA D'Importation Et D'Exportation S.A. v. Russian Federation*, No. 00-CIV-0632 (WHP) and No. 00-CIV-6995 (WHP), (combined cases), (S.D.N.Y 2000). Finally, in 2001, a court held that the 1935 agreement "merely sets forth procedures for executing letters rogatory" and "does not prohibit other means of service." *Forum Financial Group, L.L.C. v. President and Fellows of Harvard College*, 199 F.R.D. 22 (D. Me. 2001), reprinted at Pet. App. 27a. In fact, *Forum Financial* observed that the "continuing validity and applicability of the 1935 Agreement with the U.S.S.R. (not Russia) is unclear" and compared *Semtek*, which held that service on Russian defendants must be made via letters rogatory, with the U.S. State Department publication *Judicial Assistance in the Russian Federation, available at* http://travel.state.gov/ russia_legal.html which stated that

"[a]t present, no bilateral agreement on judicial assistance exists between the United States and Russia."

B. Importance of a Definitive Interpretation of the 1935 Agreement

The issue presented by this case is important. In *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 531 (1987), this Court noted that there has been a "substantial increase in litigation with foreign aspects arising, in part, from the unparalleled expansion of international trade and travel in recent decades." Since this Court's decision in *Societe Nationale* in 1987, the Iron Curtain has fallen, providing much opportunity for investment in, and trade with, former Eastern-bloc nations, such as the Russian Federation. In fact, total bilateral trade between the United States and Russia expanded 32% in 2000 to more than $10 Billion. U.S. Dept. of Commerce, Business Information Service for the Newly Independent States, *U.S.—Russia Trade Highlights (2000)*, § II, *available at* http://www.bisnis.doc.gov/bisnis/country/USRStrade_2000.htm. U.S. imports from Russia in 2000 reached an all-time high of nearly $7.8 billion, increasing more than 34% over 1999. *Id.* at § IV. Furthermore, Russia provides more products to the United States than all other Central and Eastern European countries combined. *Id.* at § VI. With such trade inevitably comes litigation. The particular issues presented by this case are likely to recur with some frequency. Indeed, it is to be expected that plaintiffs in U.S. courts will attempt to perfect service on defendants located in the Russian Federation in ways other than by letters rogatory, which this Court described as "complicated, dilatory and expensive" and "the exception, rather than the rule" for obtaining evidence located in other countries. *Societe Nationale*, 482 U.S. at 531.

This case provides an ideal vehicle for the Court to resolve the significant dispute between recent conflicting decisions

interpreting the 1935 agreement before additional disputes involving Russian defendants reach litigation. More specifically, this case presents the Court with the opportunity to provide guidance to plaintiffs in American courts seeking to perfect service on defendants located in the Russian Federation and other countries formerly associated with the Soviet Union.

II. THE LOWER COURT ERRED IN HOLDING THAT SERVICE OF PROCESS ON A RUSSIAN DEFENDANT IS INVALID UNLESS PERFECTED VIA LETTERS ROGATORY PURSUANT TO THE 1935 AGREEMENT

A. The Plain Language of the 1935 Agreement does not Set Forth the Exclusive or Mandatory Method of Perfecting Service on a Russian Defendant

The plain language of the 1935 agreement evidences no intent on the part of its drafters to make letters rogatory the exclusive method of perfecting service on a defendant located in the Russian Federation; nor does the history of the 1935 agreement evidence any such intent. Nothing in the 1935 agreement even refers to service of process on a defendant, but rather, the agreement sets forth such ministerial procedures as the fees to be paid in the execution of letters rogatory, the name of the court to which the letters rogatory were to be addressed and nature of the documents which must accompany the letters rogatory. Pet. App. 15a-23a. In fact, a leading American law dictionary, available to the 1935 agreement's drafters, defined "letters rogatory" as:

> [a] formal communication in writing, sent by a court in which an action is pending to a court or judge of a foreign country, requesting that the testimony of a witness resident within the jurisdiction of the latter court may be there formally taken under its direction and transmitted to the first court for use in the pending action.

BLACK'S LAW DICTIONARY 1092 (3rd ed. 1933). This 1933 edition of Black's Law Dictionary did not define the term "letters rogatory" in any way as encompassing the service of process on a defendant.

1. *Societe Nationale's Literal Interpretation Rule*

Courts have the authority to construe treaties and executive agreements. *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 230 (1986). *Societe Nationale* held that "[t]he great object of an international agreement is to define the common ground between sovereign nations. Given the gulfs of language, culture, and values that separate nations, it is essential in international agreements for the parties to make explicit their common ground on the most rudimentary of matters." *Societe Nationale*, 482, U.S. 522, 537, n.23 (1987). *See also Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 262 (1984) (Stevens, J. dissenting). In construing a treaty, as in construing a statute, the court must first look to its terms to determine its meaning. *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992). Since the 1935 agreement makes no mention of service of process, the trial court was in error in holding that service of process on a Russian defendant is valid only if perfected via letters rogatory.

In *Societe Nationale*, the court interpreted the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 ("Hague Convention"). The Hague Convention (like the 1935 agreement) prescribes certain procedures by which a judicial authority in one contracting state may request evidence located in another contracting state. The question presented in *Societe Nationale* concerned the extent to which a federal district court is required to employ the procedures set forth in the Hague Convention when litigants seek responses to written discovery from an

adversary located within a treaty signatory's territory. *Societe Nationale* rejected the interpretation of the Hague Convention as requiring the use of the procedures set forth in the Convention to the exclusion of any other discovery procedures whenever evidence located abroad is sought for use in an American court. *Societe Nationale*, 482 U.S. at 533-34. *Societe Nationale* held that the Hague Convention does not provide the exclusive or mandatory procedures for obtaining documents and information located within the territory of a foreign signatory. *Id.* at 529. *Societe Nationale* also rejected the interpretation of the Hague Convention as requiring that the procedures set forth in the Convention be used before resorting to other methods of gathering evidence. *Id.* at 533-34. Like the 1935 Agreement at issue in the instant case, the Hague Convention had a simple and unambiguous purpose - "to facilitate the transmission and execution of Letters of Request [and] to improve mutual judicial cooperation in civil or commercial matters." *Id.*, *quoting* Hague Convention, 23 U.S.T. at 2557. As should also be the interpretation of the 1935 agreement at issue in the instant matter, *Societe Nationale* held that the Hague Convention's preamble "does not speak in mandatory terms which would purport to describe the procedures for all permissible transnational discovery and exclude all other existing practices." *Id.* In addition, *Societe Nationale* held that the text of the Hague Convention itself "does not modify the law of any contracting state, require any contracting state to use the Convention procedures, either in requesting evidence or in responding to such requests, or compel any contracting state to change its own evidence-gathering procedures." *Id.* *Societe Nationale* further found that the words used in the Hague Convention "delineate the extent of their agreement, without prejudice to their existing rights and practices, they bound themselves to comply with any request for judicial assistance that did comply with the treaty's procedures." *Id.* at 537, n.23. The 1935 agreement's preambles (like the

Hague Convention's preamble, as interpreted by *Societe Nationale*) simply state:

> Confirming conversations between the American Embassy in Moscow and the People's Commissariat for Foreign Affairs with regard to the desirability of setting forth the procedure followed in our respective countries in the matter of the execution of letters rogatory issuing out of courts in the other, I have the honor to inform you of the conditions under which and the manner in which courts in the United States may execute letters rogatory issuing out of courts in the Union of Soviet Socialist Republics.

Note from American Ambassador to the People's Commissar for Foreign Affairs, pmbl. Pet. App. 15a. (emphasis added), and:

> Confirming conversations between the People's Commissariat for Foreign Affairs and the American embassy in Moscow with regard to the desirability of setting forth the procedure followed in our respective countries in the matter of the execution of letters rogatory issuing out of the courts in the other, I have the honor to inform you of the procedure according to which the courts of the Union of Soviet Socialist Republics will accept for execution letters rogatory of courts in the United States of America.

Note from the People's Commissar for Foreign Affairs to the American Ambassador, pmbl. Pet. App. 19a-20a. (emphasis added).

The 1935 agreement did not modify the laws of the United States or Soviet Union which were in effect at the time the agreement was made. The 1935 agreement did not require either party to change any of its laws upon the entering of the agreement. The agreement was therefore, as the formal title of the 1935 agreement suggests, only related to the procedures to be followed in the execution of letters rogatory.

Societe Nationale found that the "utter absence in the Hague Convention of an exclusivity provision has an obvious explanation: the contracting states did not agree that its procedures were to be exclusive." 482 U.S. 537, n.23. *Societe Nationale* further found that "the treaty language that the parties have agreed upon and ratified [is] a surer indication of their intentions than the separate opinion's hypothesis about the expectations of the parties." *Id.* The 1935 agreement, like the Hague Convention, set forth procedures to be used in the performance of ministerial judicial tasks such as obtaining evidence and taking witness testimony. The language used by the drafters of the 1935 agreement is clear. Had the drafters intended that the 1935 agreement apply to service of process on defendants located in the former Soviet Union, they would have placed such language in the text of the agreement itself. Since no such language is present in the 1935 agreement, the *Societe Nationale* literal interpretation rule applies — that the 1935 agreement does not require that service of process be perfected on a Russian defendant via letters rogatory.

2. *The Foreign Sovereign Immunities Act does not Require a U.S. Plaintiff to Serve the Russian Government via Letters Rogatory*

Even the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602, *et seq.* (2001), which confers immunity on foreign governments, does not require service to be perfected on the Russian Government via letters rogatory. It is illogical to interpret the 1935 agreement as requiring service on a non-governmental entity located in Russia to be perfected via letters rogatory, but permit service on the Russian government to be perfected by simply having a U.S. trial court clerk mail a copy of the summons, complaint and notice of suit, together with a Russian translation of each document, to the head of the Russian Federation's Ministry of Foreign Affairs. *See* 28

U.S.C. § 1608(a)(3) (2001). In fact, a literal reading of the 1935 agreement makes no distinction between a private party in Russia, such as Izvestia, and the Russian Government itself; an important fact, considering that neither the Russian Federation, nor the Soviet Union, are believed to have ever sought the protection of the 1935 agreement when sued as a defendant in the United States besides the withdrawn objections to service of process in the New York case. *See Compagnie NOGA D'Importation Et D'Exportation S.A. v. Russian Federation*, No. 00-CIV-0632 (WHP) and No. 00-CIV-6995 (WHP), (combined cases), (S.D.N.Y. 2000). It is, perhaps, unfortunate that the Russian Federation withdrew its objections to service of process in the New York case before the court could rule upon whether the 1935 agreement's provision allowing the Soviet government to unilaterally refuse to permit service on a defendant shields the Russian government from suit when that government is sued in U.S. courts pursuant to the Foreign Sovereign Immunities Act, but it is likely that this issue will reoccur.

B. Izvestia did not Contest Service in its Original Response to Konanykhine's Suit

In its original response to Konanykhine's lawsuit, Izvestia did not argue that service on its involuntary agent for service of process was defective or improper pursuant to Virginia law. Izvestia received actual notice of Konanykhine's suit, filed a response to that suit, and failed to further participate in the litigation until a $33,500,000 default judgment was entered after a jury trial on damages. Because Izvestia received actual notice of Konanykhine's suit, Konanykhine's service on the Virginia Secretary of the Commonwealth, Izvestia's involuntary agent for service of process, met the Due Process Clause requirement that every method of service provide "notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their

objections." *Volkswagenwerk Aktiengesellschaft, v. Schlunk*, 486 U.S. 694, 706 (1988), *quoting Mullane v. Central Hanover Bank and Trust Co.*, 339, U.S. 306, 314 (1950).

III. AN INTERPRETATION OF THE 1935 AGREEMENT WHICH REQUIRES SERVICE TO BE PERFECTED ON A RUSSIAN DEFENDANT VIA LETTERS ROGATORY RENDERS U.S. JUDICIAL SOVEREIGNTY SUBSERVIENT TO THE JUDICIAL SOVEREIGNTY OF THE RUSSIAN FEDERATION

An interpretation of the 1935 agreement which requires the use of letters rogatory in order to perfect service on a Russian defendant transacting business in the United States will allow the Russian government to use its own unreviewable discretion to decide whether an action against the Russian defendant can proceed in United States courts. The 1935 Agreement provides that "[t]he execution of letters rogatory issuing out of a court in the United States may be refused in whole or in part, if the appropriate authorities in the Union of Soviet Socialist Republics consider that the execution thereof would affect its sovereignty or safety." Note from the People's Commissar for Foreign Affairs to the American Ambassador, art. 8. Pet. App. 20a-22a. Requiring U.S. litigants, in all cases, to attempt to serve defendants located in the Russian Federation via letters rogatory pursuant to the 1935 agreement renders United States judicial sovereignty subservient to the judicial sovereignty of a foreign nation. Russian litigants will have a substantial advantage over domestic litigants in litigation in United States courts. While U.S. parties and foreign parties who are not Russian nationals will be subject to traditional service of process rules, including long-arm statutes, litigants who are Russian nationals will be able to hide behind the 1935 agreement, leaving the plaintiff's ability to obtain service of process wholly within the discretion of the Russian government.

Thus, if the Russian government refused to permit service via letters rogatory on the Russian defendant, the party who filed the suit in the U.S. court would have no way of obtaining service on the Russian defendant.

A. The Russian Legal System is Subject to Outside Influences

The U.S. Department of State has stated:

> Russia has a body of conflicting, overlapping and changing laws, decrees and regulations, which has resulted in an ad hoc and unpredictable approach to doing business. Independent dispute resolution in Russia can be difficult to obtain in a developing judicial system. Regional and local courts are often subject to political pressure.

U.S. Dept. of State, *FY 2001 Country Commercial Guide: Russia*, July 2001 at 47.

Without a stable judicial system in the Russian Federation, the United States should not cede control over whether a U.S. plaintiff can perfect service on a Russian defendant to a Russian court which is subject to outside influences.

1. *The Soviet Government has Already Protected Izvestia from a U.S. Lawsuit*

Izvestia is no stranger to American courts, having appeared as a defendant *in Kozorowski v. Russian Federation*, 1997 U.S. App. LEXIS 26266 (9th Cir. 1997), and, while not having filed an appearance, was served with process through diplomatic channels and failed to respond to the complaint in *Gregorian v. Izvestia*, 658 F. Supp. 1224 (C.D. Ca. 1987). In *Gregorian*, the Foreign Ministry of the U.S.S.R. rejected the U.S. State Department's diplomatic transmittal of the summons and complaint, citing "the principle of sovereign equality of states" and stating that "the Soviet State and its organs enjoy immunity from the jurisdiction of foreign courts." *Gregorian*, 658 F. Supp. at 1227. Had Konanykhine

(or any other U.S. plaintiff) attempted to serve Izvestia via letters rogatory pursuant to the 1935 agreement, the Russian Government could have, in their sole discretion, protected Izvestia from such a suit. Since Izvestia received such protection under the Soviet system, there is no reason to believe that it would not continue to receive such protection from the Russian Government.

2. *The Russian Government has Persecuted Konanykhine*

While in the dying Soviet Union and in the newly-born Russian Federation, Konanykhine was politically active and supported Russian President Boris Yeltsin's anti-corruption, pro-capitalist and pro-democratic policies by providing half of President Yeltsin's campaign funds. In mid-1992, several current or former KGB members kidnapped Konanykhine and seized control of his businesses under threat of death. Upon his escape from his kidnappers, Konanykhine fled to the United States, where he sought political asylum. In awarding Konanykhine political asylum, the United States Immigration Court found that the Russian government engineered false claims against Konanykhine in order to punish him for exposing corruption among Russian government and business officials. Just as it is likely that the Russian Government will protect Moscow's leading daily newspaper, *Izvestia*, from U.S. lawsuits, it is also likely that the Russian Government will not permit a pro-democracy and anti-corruption supporter living outside of Russia, such as Konanykhine, to perfect service on a high-profile Russian corporation. Therefore, because the Russian Government, at its sole discretion, can choose whether or not to allow service on a Russian defendant, it is illogical that the United States of America would have ever agreed to make the 1935 agreement the mandatory and exclusive method of perfecting service on a Russian defendant.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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